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No. 88-675

IN THE

# Supreme Court of the United States

October Term, 1988

SYNERGY GAS CORPORATION,

*Petitioner,*

v.

ROBERT SASSO, Individually and as President of LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Respondent, Robert Sasso, President of Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter, "Local 282" or "the Union"), respectfully prays that this Court deny the Petition of Synergy Gas Corporation ("Synergy" or "the Employer") for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this matter on July 26, 1988.

### Statement of the Case

The Petition for a Writ of Certiorari herein represents the latest step in an eight year effort by the Employer to thwart

a remedy for violations of the 1979-1982 collective bargaining agreement between the parties ("the Agreement").[1]

In October 1980, the Employer discharged James Brown, a driver represented by Local 282. The Union sought arbitration on Mr. Brown's behalf, and on October 4, 1981, Arbitrator James Cashen issued an Award directing the Employer to reinstate Brown retroactive to the date of discharge and to pay him full backpay. Joint Appendix before the United States Court of Appeals for the Second Circuit ("JA") 18-27.

Under Section 12(e) of the Agreement, a party is required to comply with an arbitration award within fifteen days after its issuance. Appendix to the Petition for the Writ of Certiorari ("Pet.") 21a. Following issuance of the Cashen Award, Brown was advised to return to work, and received a letter from the Employer confirming his reinstatement. In order to return to work, he quit his interim job, and proceeded to the Employer's facility, only to be told that he would not be reinstated. JA 55-56; JA 105-22.

The Employer then commenced an action in New York State Supreme Court, Suffolk County, to vacate the Cashen Award, claiming that the Arbitrator had engaged in misconduct. Local 282 filed a cross-petition to confirm. Initially, the Supreme Court confirmed the Award without a hearing, but the Appellate Division reversed and remanded for a hearing on the allegations of misconduct. *Glover Bottled Gas Corp.* v. *Local 282, I.B.T.*, 89 A.D.2d 1007, 454 N.Y.S.2d 447 (2d Dept. 1982). Following a hearing, at which the allegations of wrongdoing on the arbitrator's part were completely rejected, the Cashen Award was again

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[1] The signatories to the Agreement were Local 282 and Glover Bottled Gas Corporation ("Glover"). In February 1984, Glover changed its name to Synergy.

confirmed, and the Appellate Division affirmed. *Glover Bottled Gas Corp.* v. *Local 282, I.B.T.*, 119 A.D.2d 727, 501 N.Y.S.2d 394 (2d Dept. 1986).

Despite the confirmation of the Cashen Award, Synergy continued its refusal to reinstate Brown or to pay him any backpay. On July 12, 1985, Local 282 filed a new grievance with the American Arbitration Association ("AAA") seeking a remedy for Synergy's defiance of its contractual obligation to comply with an arbitrator's award. The issue to be arbitrated was:

> "How much money and what other relief are James Brown and Local 282 and affiliated funds entitled to receive pursuant to the arbitration award of James Cashen dated October 5, 1981."

JA 31.

Hearings were held on June 24, July 15, October 15 and November 26, 1986 before Arbitrator Jesse Simons, who had been designated by the AAA to hear and determine the July 12, 1985 grievance. While stipulating that the arbitral submission would be "What relief, if any, is James Brown entitled to pursuant to the Arbitration Award of James Cashen dated October 5, 1981," the parties agreed that the arbitrator had the authority under that submission to adjudicate on the merits the Union's claims for back pay, pension and medical benefits, attorneys' fees and union dues. Pet. 31a-32a; JA 362 n.*, 414 n.**.[2]

On June 15, 1987, Arbitrator Simons issued a 68 page Opinion with the following Award:

> I. The Employer, subject to III-A. herein, is directed to pay forthwith to James Brown:

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[2] By the time the hearing convened, Brown was suffering from a brain tumor and was unable to work. JA 60-67. Consequently, Local 282's reinstatement demand became moot.

A. Back pay in the amount of $57,285 plus accrued interest from October 20, 1980 through March 31, 1987 in the amount of $32,255 for a total of $89,540;

B. Simple interest at 16% on the above back pay which totals $25.00 per day from April 1, 1987 until the date of payment;

C. $2,640 in lieu of profit sharing plan contributions, plus simple interest at 16% (totaling $1.16 per day) from April 1, 1987 until the date of payment.

II. The Employer is directed to pay forthwith to Local 282 Pension Trust Fund:

A. Contributions from October 24, 1980 through January 31, 1983 in the amount of $6,104 plus accrued interest from January 1, 1982 through March 31, 1987 in the amount of $5,127, for a total of $11,231;

B. Simple interest at 16% of $2.68 per day from April 1, 1987 until the date of payment.

III-A. The Employer is to deduct from the $57,285 to be paid to Grievant in I-A above, a sum equal to the dues specified in Article 13(a) and 13(b) of the Agreement, that would have been deducted from the wages of Grievant (after deducting for wages earned and unemployment benefits) that Grievant would have earned working for the Employer for the period October 9, 1980 to January 31, 1983 plus simple interest at 16% accruing beginning December 1, 1981 to the date of payment, and said sum is to be calculated on the basis of the Union's calculations as set forth in its Brief, and said sum is to be paid forthwith to Local 282, I.B.T., and in the event the Union concludes that the

> amount paid is incorrect it may, on prompt written notice to the Employer and the Undersigned, submit its dues claim at the hearing referred to below in III-B, and the Undersigned retains jurisdiction to determine said amount.
>
> III-B. The Employer is directed to pay to Local 282, I.B.T. a sum equal to the reasonable attorneys' fees incurred as a result of litigating the Employer's refusal to comply with Arbitrator Cashen's Award of October 5, 1981 in violation of Section 12(e) of the Glover-282 I.B.T. Collective Bargaining Agreement (Union Exhibit 2), and the Undersigned herewith retains jurisdiction to determine the amount of said fees, and hearings on same will be scheduled as promptly as possible, and jurisdiction is retained until such hearing and determination is made.

JA 427-28.

On July 9, 1987, the Union wrote Arbitrator Simons asking him to schedule a hearing to determine the amounts of union dues and attorneys' fees payable pursuant to Paragraphs III-A and III-B of his Award. Synergy responded by bringing an action to vacate the Simons Award in New York State Supreme Court, Nassau County, and obtaining an *ex parte* stay of further proceedings before Arbitrator Simons. Local 282 promptly removed the action to the United States District Court for the Eastern District of New York, counterclaimed to confirm the Award, and moved to consolidate this action with *Jaspan* v. *Synergy*, No. CV-87-0164 (E.D.N.Y. January 25, 1988) another case involving Synergy's defiance of an arbitrator's back pay award. Synergy moved to remand to New York State Supreme Court. By an oral decision dated September 19, 1987, Chief Judge Jack Weinstein denied the Union's motion to consolidate and the Employer's motion to remand. JA 523.

The parties then cross-moved for summary judgment, and by an oral decision dated January 25, 1988 (JA 620), and an Order dated February 4, 1988 (Pet. 17a-18a), Chief Judge Weinstein confirmed the Simons Award, vacated the State Supreme Court stay, and remanded to Arbitrator Simons for the calculation of attorneys' fees. Synergy appealed, and on July 26, 1988, the United States Court of Appeals for the Second Circuit unanimously affirmed Chief Judge Weinstein. Pet. 1a-16a. An application by Synergy to the Second Circuit for a stay was denied, and Synergy then filed the instant Petition for a Writ of Certiorari.

## Summary of Argument

Synergy's Petition for a Writ of Certiorari satisfies none of this Court's discretionary considerations governing review on certiorari. Synergy concedes that the Second Circuit decision does not create a conflict among the Circuits. *See* Pet. 17. Neither can Synergy point to a conflict with any decisions of this Court or to any important question of federal law which has not been, but should be, settled by this Court.

Instead, this case involves a routine application of the principles enunciated in *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) and *United Paperworkers International Union* v. *Misco, Inc.*, 108 S. Ct. 364 (1987). Synergy's efforts to give this case a larger significance misconstrues the record before the arbitrator and his well-reasoned Opinion and Award.

## ARGUMENT

### I.

### Synergy Consented to an Adjudication on the Merits of the Union's Claims.

Synergy argued in the Second Circuit, and appears to be contending herein, that the submission to the arbitrator precluded the award of pension contributions, union dues and attorneys' fees. That is simply incorrect.

The Union's arbitration demand sought a determination of "How much money and what other relief are James Brown and Local 282 and affiliated funds entitled to receive pursuant to the arbitration award of James Cashen dated October 5, 1981." JA 31. Throughout the arbitration proceedings, the Union's claims for Pension Fund contributions. Union dues, medical reimbursement and attorneys' fees were repeatedly discussed. Pet. 23a-32a; JA 87-90, 177-84, 241-49. In determining the formal submission, the parties expressly agreed that Arbitrator Simons would have the authority to grant, "if it's justified," all of the Union's claims. Pet. 11a. The following colloquy from the transcript of the October 15, 1986 hearing, portions of which were excerpted by the Second Circuit in its decision (Pet. 11a), is dispositive of Synergy's contention:

> The Arbitrator: . . . Counselor, can you agree to a a (sic) stipulated issue to be arbitrated, which would consider the very simple language, what relief is James Brown entitled to pursuant to Arbitrator Cashen's award of October 5, 1981 with the clarification, which is now on the record perhaps three times, that I have made, namely, that you are free to advance all these other claims, and I will adjudi-

cate them, and he is free to advance arguments where you are not entitled to pension contributions, or payment of legal fees, or of payment medical fees, et cetera, et cetera?

I am saying all the claims you would advance under the heading of his rights as a reinstated employee pursuant to Cashen, I will entertain them. I will consider them, and I will decide them, and I will direct a payment with respect to that, if your argument is sustained. If it is not, there will be no direction of payment.

[Local 282's Attorney]: Based upon clarification and the understanding that you interpret this language to include—if it's justified—relief that might be actually paid to some other entity, I have no problem with that.

The Arbitrator: So when I said up for grabs, I mean up for grabs.

[Synergy's Attorney]: Yes.

The Arbitrator: All right.

[Synergy's Attorney]: Insert the words "If any," and—

The Arbitrator: So let us then rewrite what now appears as 6, and agree to it on the record.

[Synergy's Attorney]: Which we have been on?

The Arbitrator: Yes.

The Arbitrator: The parties are agreed, and have so stated, that the following issue is the issue to be arbitrated by me: "What relief, if any, is James Brown entitled to pursuant to the arbitration award of James Cashen, dated October 5, 1981."

Pet. 31a-32a.

In upholding arbitrator Simons' Award, the Second Circuit stated "that any doubt concerning the scope of the submission agreement is to be resolved in favor of coverage. . . ." Pet. 11a, *citing Federal Commerce & Navigation Co.* v. *Kanematsu-Gosho, Ltd.*, 457 F.2d 387, 390 (2d Cir. 1972); *accord Kurt Orban Co.* v. *Angeles Metal Systems*, 573 F.2d 739, 740-41 (2d Cir. 1978). At least three other Circuits agree that an arbitrator's interpretation of the scope of the submission is subject to great deference. *See Cement Divisions, National Gypsum Co.* v. *United Steelworkers of America*, 793 F.2d 759, 765 (6th Cir. 1986); *Mobil Oil Corp.* v. *Independent Oil Workers Union, OCAW*, 679 F.2d 299, 302 & n.1 (3d Cir. 1982); *IAM District 776* v. *Texas Steel Co.*, 639 F.2d 279, 283 (5th Cir. 1981); *cf. Enterprise Wheel & Car*, 363 U.S. at 598 ("It is not apparent that [the arbitrator] went beyond the submission"). Here, however, the degree of deference due an arbitrator's interpretation of the scope of the submission is not even properly before the Court. As Arbitrator Simons twice noted in his Opinion (JA 362 n.*, 414 n.**), Synergy expressly agreed that the arbitrator would have the authority to rule on the merits of all of the Union's claims. By doing so, the Employer waived any claim that the arbitrator exceeded the scope of the submission.

## II.

### The Arbitrator's Interpretation of the Agreement Did Not Exceed His Authority.

In its Petition, the Employer repeatedly conflates its objections to the Arbitrator's jurisdiction, which were waived, with its objections on the merits, which are insubstantial. In particular, Synergy disagrees with the arbitrator's finding that the Agreement authorized an award of attorneys' fees to Local 282.

Arbitrator Simons based his award of attorneys' fees on two independent and alternative grounds. The Arbitrator's first ground for the award of attorneys' fees was Synergy's violation of Section 12(e) of the Agreement, providing for compliance with an award within fifteen days after issuance. Simons found that Synergy violated the Agreement twice; first, by its discharge of Mr. Brown in 1980 without just cause in violation of Section 12(f) of the Agreement; second, by its refusal to comply with the Cashen award in 1981 in violation of Section 12(e). While reinstatement with backpay is the ordinary remedy for the first violation, the Arbitrator ruled that Section 12(e) creates an additional obligation on the Employer's part to make the Union whole for its expenses incurred as a consequence of the violation of that provision. JA 421-22. Arbitrator Simons interpreted that "make whole" remedy to include attorneys' fees.

Synergy contends that the Arbitrator misconstrued Section 12(e), and that the sole purpose of that Section was to authorize the Union to strike upon the Employer's failure to comply with an award. However, an arbitrator's purported error in construing a collective bargaining agreement does not warrant reversal of his award. *Misco,* 108 S. Ct. at 370-71; *Enterprise Wheel & Car,* 363 U.S. at 598-99. Under the decisions of this Court, it is the Arbitrator who is deemed to be familiar with the parties' bargaining history and industry practice; it is the judgment of the Arbitrator for which the parties bargained. *Id.* at 596-97; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578-82 (1960).

As Arbitrator Simons noted, Section 12(e) is an "unusual" contract provision. JA 422. His construction of that unusual provision was reasonable, and is not subject to "plenary review by a Court of the merits." *Enterprise Wheel & Car,* 363 U.S. at 598-99; *see Misco,* 108 S. Ct. at 370-71.

The Arbitrator's second ground for the award of attorneys' fees was that Synergy's protracted defiance of the Cashen Award was frivolous and undertaken in bad faith. Synergy cannot credibly contend that the Arbitrator's factual findings in that respect were erroneous. For over eight years, Synergy has been avoiding its responsibility for its unlawful discharge of an older employee now suffering from a brain tumor. *See* JA 400-401. It made false accusations against Arbitrator Cashen, and frivolous arguments to Arbitrator Simons. Moreover, as Arbitrator Simons noted, Synergy has a history of willful defiance of its legal obligations.[3]

Arbitrator Simons had ample grounds for his finding that by engaging in "conscious, deliberate and egregious wrongdoing," (JA 423), Synergy had acted in bad faith within the meaning of *Alyeska Pipe Line Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). He was fully justified in implying into the Agreement an obligation on Synergy's part to make the Union whole for the damages resulting

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[3] Local 282 represents only two small bargaining units of Synergy employees, yet the Employer has amassed a record of lawlessness unrivaled by malfeasant companies many times its size. *See, e.g., Glover Bottled Gas Corp.*, 255 NLRB 137 (1981), *enforced*, 112 LRRM (BNA) 2895 (2d Cir. 1982) (unlawful discharge of driver); *Glover Bottled Gas Corp.* v. *Local Union No. 282, I.B.T.*, 711 F.2d 478 (2d Cir. 1983) and *Glover Bottled Gas Corp.* v. *Local 282, I.B.T.*, 767 F.2d 907 (2d Cir. 1985) (unlawful discharge of shop steward and two other drivers); *Glover Bottled Gas Corp.*, 275 NLRB 658 (1985), *enforced*, 801 F.2d 391 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1288 (1987) (illegal discharge of four office employees); *Synergy Gas Corp., a/k/a Glover Bottled Gas Corp.*, 283 NLRB No. 100 (1987); *enforced*, 843 F.2d 1510 (2d Cir. March 30, 1988) (unlawful refusal to bargain); *Glover Bottled Gas Corp.*, Cases 29-CA-10641, 29-CA-10763-1, 29-CA-10763-2, 29-CA-10795-1, 29-CA-10795-2, 29-CA-11302, 29-CA-12653, Decision of ALJ Philip P. McLeod dated August 26, 1987 (JA 477) (numerous, violations including, *inter alia*, unlawful refusal to bargain, unlawful withholding of benefits, unlawful refusal to reinstate strikers and unlawful second discharge of shop steward).

from that bad faith.[4] His determinations concerning the nature of the Employer's conduct and the meaning of the Agreement were correct, and in any event are not subject to review on the merits. *See Misco*, 108 S. Ct. at 370-71.

An arbitrator's discretion is greatest *"when it comes to formulating remedies."* *Misco*, 108 S. Ct. at 372 (emphasis in original), *quoting Enterprise Wheel & Car*, 363 U.S. at 597. Arbitrator Simons reviewed the parties' arguments with care, and formulated an appropriate remedy based upon two alternative grounds.

An arbitrator's award will be sustained as long as he is "even arguably construing or applying the contract." *Misco*, 108 S. Ct. at 371. In order to warrant judicial relief, Synergy would have to demonstrate the invalidity of each of the grounds asserted by Arbitrator Simons as a basis for his Award. *Cf. Enterprise Wheel & Car*, 363 U.S. at 598 (where arbitrator's opinion is ambiguous as to whether he has exceeded his authority, award will nevertheless be confirmed). Here, both grounds asserted by the arbitrator are plausible, and there is no basis for second-guessing his "well reasoned sixty-eight page opinion." Pet. 16a.

Synergy correctly notes that arbitrators do not frequently award attorneys' fees.[5] Nothing in Arbitrator Simons'

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[4] Under New York law, a covenant of good faith and fair dealing has long been implied into every contract. *See, e.g., Kirke LaShelle Co.* v. *Paul Armstrong Co.*, 263 N.Y. 79 (1933). While New York law is not binding on the arbitrator, it can hardly be said that an arbitrator, construing a collective bargaining agreement executed in New York, is precluded from implying a similar covenant into the parties' Agreement.

[5] There are few reported decisions awarding such relief. *See, e.g., Fortex Mfg. Co.* v. *Local 1065, Amalgamated Clothing Workers of America*, 99 L.R.R.M. (BNA) 2303 (M.D. Ala. 1978); *Litton Unit Handling Systems* v. *Shopmen's Local Union No. 522*, 90

*(footnote continued on following page)*

Award or in the Second Circuit decision is likely to change that state of affairs. The arbitrator was confronted with an "unusual" contract clause and "egregious" employer behavior. The threat of a flood of arbitral attorneys' fee awards following in the wake of the Simons Award is pure mirage.

After eight years, it is time for this dispute to be put to rest. The Employer's Petition for a Writ of Certiorari does not raise any issue warranting review by this Court.

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*(footnote continued from preceding page)*

L.R.R.M. (BNA) 3176 (S.D. Ohio 1975); *John Morrell & Co.*, 69 Lab. Arb. (BNA) 264, 282 (1977) (Conway, Arb.); *Sonic Knitting Industries, Inc.*, 65 Lab. Arb. (BNA) 453, 469 (1975) (Helfeld, Arb.); *Basic Vegetable Products, Inc.*, 64 Lab. Arb. (BNA) 620, 625 (1975) (Gould, Arb.); *Sunshine Convalescent Hospital*, 62 Lab. Arb. (BNA) 276, 279 (1974) (Lennard, Arb.); *see generally Leavenworth Times*, 71 Lab. Arb. (BNA) 396, 409 (1978) (Bothwell, Arb.).

## Conclusion

For the foregoing reasons, Respondent respectfully submits that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Date: New York, New York
November 22, 1988

Respectfully submitted,

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